

STATE OF TEXAS

vs.

ZENA COLLINS STEPHENS

§ IN THE DISTRICT COURT

§

§ 344TH JUDICIAL DISTRICT

§

§ CHAMBERS COUNTY, TEXAS

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Zena Collins Stephens, Defendant, and files this her reply to the State's response filed on February 7, 2019. This reply addresses the legal contentions set forth in State's response. Along with the reply, the Defendant has filed a pleading entitled "Second Motion to Quash and Supplement to Pretrial Writ of Habeas Corpus". The Second Motion to Quash and Supplement moots some of the issues complained of in the State's response.

The Attorney General concedes that no Court in the history of Texas has endorsed the proposed butchering of the controlling venue statutes applicable to each of the alleged offenses. That is to say, *no where* in the history of the State has a Court agreed that chapter §273.024 of the Texas Election Code permits the Attorney General to unilaterally disregard specific controlling venue provisions as is being done in this case. Nor can counsel find *anyone* in the history of the State of Texas

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prosecuted in such a manner, even amongst the similarly situated defendants that are before this Court in other cause numbers.

The lack of a proper venue is applicable to *all* Counts in the indictment. Count I is controlled by the Texas Code of Criminal Procedure §13.18, which specifically provides, “if venue is not specifically stated, the proper county for prosecution of offenses is that in which it is committed.”¹ Counts II and III are controlled by Texas Election Code §251.004, which states that “venue for an offense proscribed by this title is in the county of residence of the defendant.”² The indicted offenses in Counts II and III are in Title 15 of the Election Code, which encompasses Election Code chapters 251-258. The venue provision relied upon by the Attorney General specifically states that it only applies to “an offense under this subchapter.”³ Thus, there is no meaningful argument that venue lies for *any* of the alleged offenses in the indictment. In other words, improper venue for any one of the indictment counts merits quashing the entire indictment, and here, there is no proper venue for *any* count in the indictment.

**RESPONSE TO STATE’S REPLY TO ARGUMENTS ONE & TWO:
TAMPERING WITH A GOVERNMENTAL RECORD IS NOT ELECTION
LAW VIOLATION AND A CANDIDATE OFFICE HOLDER REPORT IS
NOT AN ELECTION RECORD**

The Government argues that Count I is statutorily authorized to be prosecuted

¹ Tex Code Crim P. §13.18.

² Tex. Elec Code § 251.004(a) (“venue for an offense proscribed *by this title*...”)

³ Tex. Elec Code § 273.024; *See State’s Response Footnote 3*(“*An offense under this subchapter...*”)

by the Attorney General as a violation of *election laws*, and the Attorney General is statutorily authorized to prosecute the offense in the county in which it occurred or in an adjoining county, thus conferring jurisdiction upon this Court. The Government relies upon Section 31.003 of the Election Code to support their proposition that the Attorney General has authority to prosecute violations of *election laws*.

The Government cites Lightbourn v. County of El Paso, Tex., 118 F.3d 421 (5th Cir. 1997), as standing for the proposition that the plain language of Section of 31.003 indicates the legislature envisioned laws falling outside of the Election Code, but still being “election laws” that would be governed by Chapter 273 of the Texas Election Code. However, they failed to offer the Fifth Circuit’s holding in Lightbourn.

In Lightbourn, the Fifth Circuit held, “the phrase ‘election laws outside this code’ only encompasses laws that specifically govern elections, not generally applicable laws that might cover some aspect of elections.”⁴ The district court found that the Secretary of State had a duty to warrant that local election authorities followed the Americans with Disabilities Act (hereinafter, “ADA”), based on Sections 31.003 and 31.005 of the Texas Election Code.⁵ However, the Secretary

⁴ *Id.* at 430–31.

⁵ *Id.* at 427.

of State argued that the district court erred in holding that he violated the ADA by breaching a duty to ensure that local election authorities comply with the ADA⁶. Thus, in determining whether these sections imposed a duty on the Secretary to ensure compliance with the ADA throughout Texas, the answer turned on whether the phrase “election laws outside this code” included the ADA⁷.

The Fifth Circuit explained that the Texas [Election] Code does not define “election laws,” and [they] have found no case construing this phrase.⁸ . Thus, we first look to the ordinary, contemporary, common meaning of “election laws.”⁹ The Fifth Circuit Court reasoned

“that the common meaning of ‘election laws’ is laws that specifically govern elections, rather than generally applicable laws that may affect elections. If the Texas legislature wanted §31.003 to cover the latter, we doubt that it would have inserted the adjectival modifier “election” directly before the noun “law.” By forming an open compound phrase such as “election law,” the Texas legislature meant “a combination of separate words that are so closely related as to constitute a single concept.” Chicago Manual of Style §6.33 (14th rev. ed. 1993). An “election district,” for instance, is not a district devised for many functions, including elections; it is “a district created for the purposes of elections.” 5 Oxford English Dictionary 116 (2d ed. 1989). Moreover, an “election board” is not an agency that carries out all the responsibilities of a municipality, including elections; it is

⁶ *Id.*

⁷ *Id.* at 429.

⁸ *Id.*

⁹ *Id.*; See *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979) (noting that it is a “fundamental canon of statutory construction ... that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning”).

an agency “charged with the conduct of elections.” Black's Law Dictionary 519 (6th ed.1990).¹⁰

Here, the Government provided a “non-comprehensive list of election laws found outside of the Election Code,” without providing any source for their assertion of fact. However, in analyzing the referenced Penal Code offenses, they are not “election laws found outside of the Election Code,” as the Government wants you to believe. For example,

Theft, 31.03(e)(4)(E): This section of the statute references the *type of property* that, if appropriated, makes theft a state jail felony for *punishment* purposes. There is no reference to the Election Code in its codification.

Coercion of Public Servant or Voter, 36.03(a)(2): This offense has been ruled unconstitutional and is no longer a valid law per Ex parte Perry, 483 S.W.3d 884 (Tex. Crim. App. 2016).

Tampering with a Governmental Record, 37.10(a)(2): There is no reference to the Election Code within this section of the statute; however, there are numerous references to the Education Code, Tax Code and the Government Code. This illustrates that if the legislature intended to make this an “election law,” they would have explicitly indicated such in the codification of the statute. The mere mention of an official ballot or other election record as a governmental record, does not make this offense an “election law.” And even it did, the State would need to demonstrate that a campaign office holder report as alleged here was in fact an “election record” which it plainly is not.

Places Weapons Prohibited, 46.03(a)(2): This statute is found under Title 10 of the Penal Code, and relates to offenses against public health, safety, and morals. Furthermore, the purpose of this law is to protect the community from possible gun violence in vulnerable place. In addition, there is no reference to the Election Code codified within this statute.

¹⁰ Lightbourn v. County of El Paso, Tex., 118 F.3d 421, 429–30 (5th Cir. 1997). Their analysis based upon this reasoning suggested that the ADA was not an election law. *Id.*

Gambling, 47.02(a)(2): This section illustrates what types of matters the legislature intended to be considered illegal if gamble on. Furthermore, there is no reference to the Election Code within the statute; however, there are references to the Occupations Code, Government Code and the Texas Racing Act.

Bribery, 36.02(a)(2): This statute has language within its codification that references the Election Code. However, the reference to the Election Code was in regard to a definition to be utilized, and not in regard to the substance of the law.

After analyzing the proffered Penal Code offenses the Government asserts to be “election laws,” this Honorable Court can clearly see that they are not. Furthermore, in considering the analysis the Fifth Circuit used in Lightbourn, the offense of “Tampering with a Governmental Record,” as charged in Count I of the indictment, is not an offense that specifically governs elections, and is a law that might only cover some aspect of elections.

CHALLENGES SUCH AS THAT BROUGHT HERE ARE SPECIFICALLY CONTEMPLATED BY THE CODE CONSTRUCTION ACT OF TEXAS AND RUNNING FOR PUBLIC OFFICE AND CAMPAIGN CONTRIBUTION ISSUES ARE INHERENTLY CORE FIRST AMENDMENT ISSUES

Additional detailed discussion on these points will be presented at the hearing. However, the Court is likely well served to review, and Ms. Stephens will certainly rely on, at least in part, the Code Construction Act of Texas. Specifically, Tex. Govt Code §311.035 (b) which provides in part that “a statute or rule that creates or

defines a criminal offense or penalty shall be construed in favor of the actor....”¹¹

This statute along with other cited material will be forwarded to the Court for review prior to the hearing in this matter.

As for the First Amendment – again, for the sake of brevity, all applicable authority is not cited here – this case arises out of the protected political activity of running for public office and the receipt of campaign contributions. Both have very strong First Amendment protections that are well settled¹². Additionally, Counsel previously has referenced the First Amendment in response to the State’s efforts to stifle the speech of an elected official by seeking a gag order after releasing its own statement, which skirted, if not violated, Tex. R. Prof Conduct 3.07(b)(4). *See* Attorney General Press Release (“The conduct of the people indicted by the grand jury is illegal....”).

WHEREFORE, PREMISES CONSIDERED, Sheriff Zena Collins Stephens prays that the Court quash the Indictment and/or grant due to the defects of form outlined above and Grant the pretrial Writ and discharge Zena Collins Stephens.

¹¹ *See Tex Govt Code § 311.035*

¹² *See Buckley v. Valeo* 424 U.S. 1 (1976); *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010)

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on February 14, 2019 a true and correct copy of the above and foregoing document was served on the Texas Attorney General, Chambers County, by electronic service through the Electronic Filing Manager.

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